

Randall B. Bateman (USB 6482)
BATEMAN IP
299 South Main Street, Suite1300
Salt Lake City, UT 84111
Tel: (801) 533-0320
Email: rbb@batemanip.com; mail@batemanip.com

Attorneys for Plaintiffs The Wizard Trades, LLC and Michael Hubbs

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

THE WIZARD TRADES, LLC, a Utah
Limited Liability Company, and MICHAEL
HUBBS, an individual,

Plaintiff,

vs.

CHARLTON LACHASE, an individual,
ANDRA RUSH, an individual, STEVEN
DUHON, an individual, and BRIAN
HERTNEKY, and individual,

Defendants.

**OPPOSITION TO BRIAN
HERTNEKY’S MOTION TO DISMISS**

Case No. 2:23-cv-00207-DAO

Judge Daphne A. Oberg

Plaintiffs, The Wizard Trades, LLC, and Michael Hubbs, hereby oppose the Motion to Dismiss filed by Defendant Brian Hertneky.

BACKGROUND

Plaintiffs The Wizard Trades, LLC (“TWT”) and Michael Hubbs sell a video series providing instruction in sign language on how to engage in day trading. Purchasers are advised that investing in the stock market is risky and are advised to set up a practice account to practice trading with a practice account until they are sufficiently comfortable with the teachings of the program to invest their own money. They are also provided with personal tutoring from Mr.

Hubbs if requested.

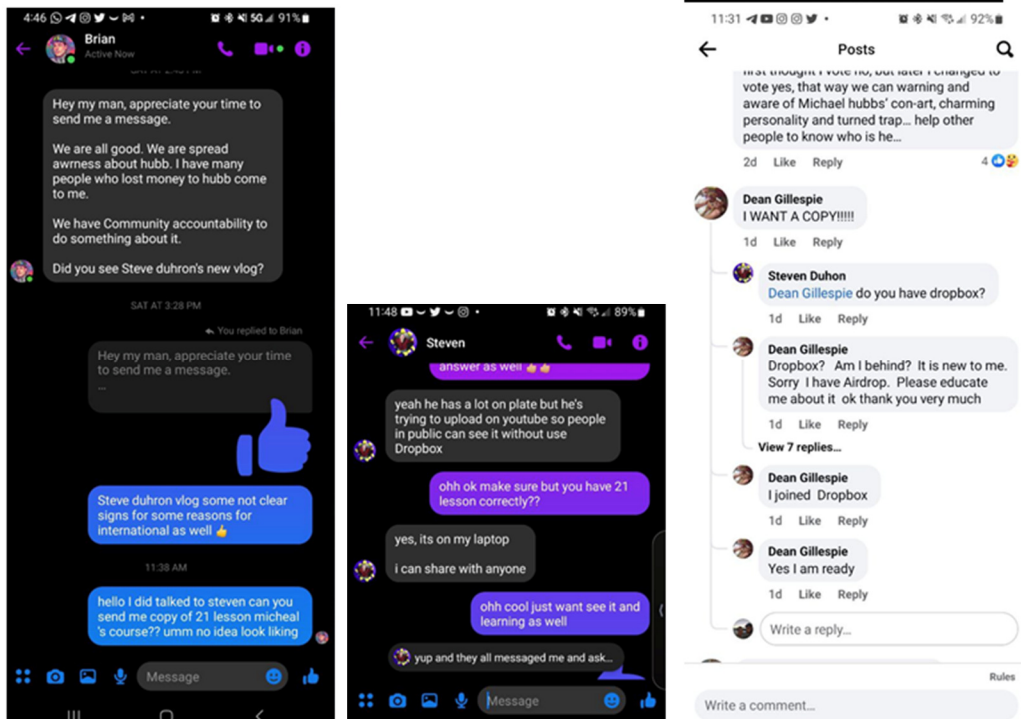
Defendant Charlton Lachase purchased the program. Rather than practice the principles taught in a practice account to ensure that he understood how to apply the concepts, Mr. Lachase opened a live account and allegedly had substantial losses. Mr. Lachase then threatened to provide the TWT videos to the public and threatened to destroy the Plaintiff's business. Mr.

Lachase stated:

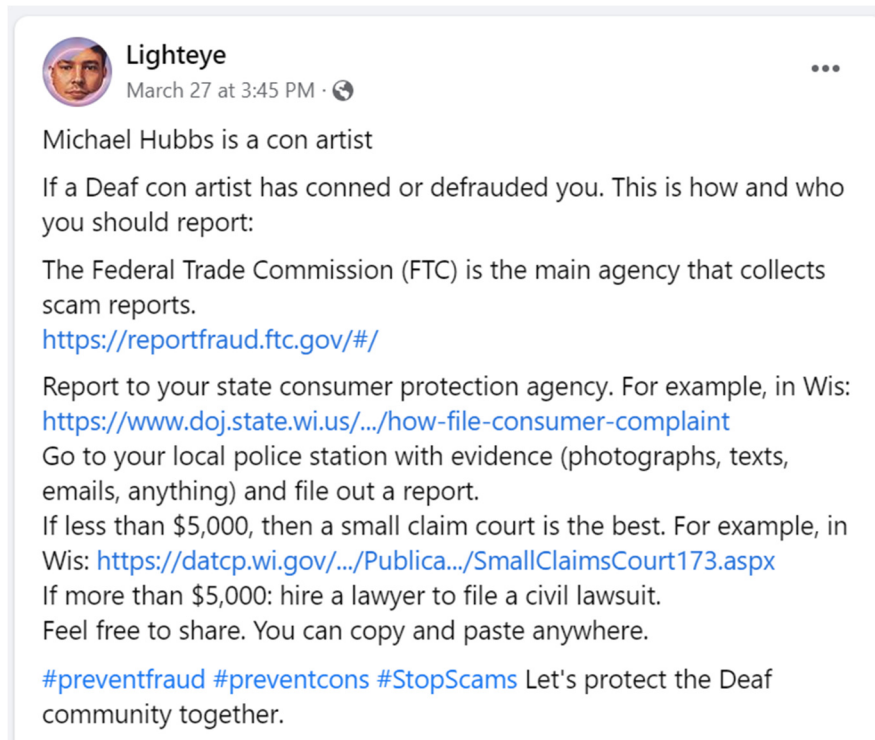
I will share everything of his course materials from lesson 1 to lesson 21 FREE FOR EVERYONE, EVERYTHING FREE hahahaha. I haven't signed any contract, means I can do anything... hahaha. Freedom of speech.

Mr. Lachase went on to state that he would destroy Mr. Hubbs.

Defendant Brian Hertneky is an acquaintance of Mr. Lachase and is the admin for a Facebook group called Deaf Stocks & Cryptos, which provides discussions about day trading. Mr. Hertneky and the moderator of the group, Steven Duhon, conspired to upload all of the Plaintiff's videos to Youtube so that the videos could be seen for free by the public.



Defendants Hertneky and Duhon repeatedly called Mr. Hubbs a con-artist and Mr. Hertneky took the 21 videos provided by Mr. Duhon and posted them to Youtube.



Thus, Plaintiffs have asserted claims for copyright infringement, libel and slander, tortious interference with economic relations, and false advertising.

ARGUMENT

I. HERTNEKY FAILS TO IDENTIFY A BASIS FOR A DISMISSAL

Defendant Hertneky filed a motion to dismiss, but fails to identify any legal basis for such a dismissal. There is no reference to Rule 12(b) of the Federal Rules of Civil Procedure. Nor is there any references to some other statute or case law which would serve as a basis for dismissing the causes of action. Simply put, Mr. Hertneky fails to identify any legal basis for dismissing the First Amended Complaint.

In considering a Motion to Dismiss, the Court must accept “as true all of the well-pled factual allegations.” *Coll v. First American Title Insurance*, 642 F.3d 876, 886 (10th Cir. 2011) (citing *Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010)). All inferences in this analysis are

read in favor of the pleader. *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). Having failed to identify any defect in the allegations, Mr. Hertneky has failed to provide a basis for dismissal of the lawsuit.

II. HERTNEKY'S MOTION IS AN ADMISSION HE ENGAGED IN THE CONDUCT ALLEGED.

Not only does Mr. Hertneky not provide a basis for dismissal of the First Amended Complaint, he actually admits to engaging in the conduct alleged. Mr. Hertneky admits posting videos calling Mr. Hubbs a con artist on a Facebook page which has 2400 members. Referring to someone as a "con artist" is defamatory *per se*. *Carroll v. TheStreet.com, Inc.*, 2014 U.S. Dist. LEXIS 156499, *46 (S.D. FL. 2014); *Reynoso v. Tousson*, 2019 U.S. Dist. LEXIS 156982 (E.D. NY. 2019)(The challenged statements are defamatory per se because, by portraying Reynoso as a con artist, they "tend to injure the plaintiff in his. . . trade, business or profession. Thus, "proof of special harm is unnecessary." (Citations omitted).

Mr. Hertneky also admits to posting Mr. Hubb's copyrighted content to Youtube where the public can access the content for free. Mr. Hertneky's only defenses are that he was trying to warn the deaf community about Mr. Hubbs, and that after Youtube took down the videos for copyright infringement, he stopped sharing the information.

Furthermore, Mr. Hertneky admits that he was trying to discourage members of the deaf community from dealing with Mr. Hubbs. While such would be legal if done in a non-tortious way, the fact that Mr. Hertneky engaged in defamation *per se* and copyright infringement to discourage people from purchasing Plaintiff's video series demonstrates that that he engaged in

tortious interference with economic relations and that he engaged in false advertising. Mr. Hertneky set out to damage Mr. Hubbs business and has succeeded in that objective.

Mr. Hertneky's admissions that he engaged in unlawful conduct does not justify a dismissal of the lawsuit. To the contrary, Mr. Hertneky's admissions entitle Plaintiffs to a partial summary judgment against Mr. Hertneky, that he engaged in defamation *per se*, and that he engaged in copyright infringement, tortious interference and false advertising.

Therefore, Mr. Hertneky's motion to dismiss should be denied.

Respectfully submitted this 5th day of May 2023.

BATEMAN IP

/s/ Randall B. Bateman

Randall B. Bateman

*Attorneys for Plaintiffs The Wizard Trades, LLC
and Michael Hubbs*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPPOSITION TO BRIAN HERTNEKY'S
MOTION TO DISMISS** was served on Defendants via First Class mail on May 5, 2023, as follows:

Steven Duhon
(at the address of service identified in the executed Summons)

Brian Hertneky
(at the address of service identified in the executed Summons)

Charlton Lachase
(at the address of service identified in the executed Summons)

/s/Randall B. Bateman